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**THIS DISPOSITION
IS NOT CITABLE AS PRECEDENT
OF THE T.T.A.B.**

Paper No. 12
Bottorff

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Louis Upkins

Serial No. 75/752,808

Linda Urbanik Johnson of Piper Marbury Rudnick & Wolfe for
Louis Upkins.

James M. Marcus, Trademark Examining Attorney, Law Office
109 (Ronald R. Sussman, Managing Attorney)

Before Hohein, Chapman and Bottorff, Administrative
Trademark Judges.

Opinion by Bottorff, Administrative Trademark Judge:

Applicant seeks registration on the Principal Register
of the mark TEAM 316 (in typed form) for "men's and women's
clothing, namely, shirts, pants, jackets, sweaters,
sweatshirts, socks, shoes, and hats."¹ Applicant has
voluntarily disclaimed the right to use "316" apart from
the mark as shown.

¹ Serial No. 75/752,808, filed July 16, 1999. The application is
based on intent-to-use under Trademark Act Section 1(b), 15
U.S.C. §1051(b).

The Trademark Examining Attorney has refused registration under Trademark Act Section 2(d), 15 U.S.C. §1052(d), on the ground that applicant's mark, as applied to applicant's goods, so resembles the mark depicted below,



previously registered for "clothing, namely, t-shirts, sweatshirts, sweatpants, hats, shirts and pants,"² as to be likely to cause confusion.

When the refusal was made final, applicant filed this appeal. Applicant and the Trademark Examining Attorney filed main briefs,³ but applicant did not file a reply brief. No oral hearing was requested. We affirm the refusal to register.

² Registration No. 2,021,003, issued December 3, 1996.

³ We sustain the Trademark Examining Attorney's objection to the evidentiary materials applicant submitted with its appeal brief, and have given those materials no consideration. See Trademark Rule 2.142(d).

Our likelihood of confusion determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the likelihood of confusion factors set forth in *In re E. I. du Pont de Nemours and Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In considering the evidence of record on these factors, we keep in mind that "[t]he fundamental inquiry mandated by §2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks." *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

We find that applicant's goods, as they are identified in the application, are similar to the goods identified in the cited registration; indeed, applicant's and registrant's goods are identical in certain particulars (i.e., shirts, sweatshirts and pants). There are no limitations or restrictions in either the application or the registration, so we must presume that applicant and registrant would market their respective goods in all normal trade channels and to all normal classes of purchasers for such goods, including in each other's trade channels and to each other's potential purchasers. See *In re Melville Corp.*, 18 USPQ2d 1387 (TTAB 1991). We further

find that clothing items of the types identified in applicant's application and in the cited registration generally are inexpensive items which would not necessarily be purchased with a great deal of care. These facts all weigh in favor of a determination that a likelihood of confusion exists in this case.

Next, we turn to a determination of whether applicant's mark and the cited registered mark, when compared in their entireties in terms of appearance, sound and connotation, are similar or dissimilar in their overall commercial impressions. The test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression that confusion as to the source of the goods offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. See *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975). Furthermore, although the marks at issue must be considered in their entireties, it is well-settled that one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature in determining the commercial

impression created by the mark. See *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985).

Finally, where, as in the present case, the marks would appear on virtually identical goods, the degree of similarity between the marks which is necessary to support a finding of likely confusion declines. *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ 1698 (Fed. Cir. 1992).

In terms of appearance, sound and connotation, applicant's mark differs from the cited registered mark to the extent that applicant's mark includes the word TEAM while the registered mark does not, and to the extent that the registered mark includes a small "j" in the midst of the "316" and an oval carrier device around the "316," while applicant's mark does not. However, we find that these points of dissimilarity are greatly outweighed by the obvious point of similarity between the two marks, i.e., the fact that both marks feature the numeral "316" as their most prominent and dominant feature.

"316" dominates the cited registered mark by its sheer size as compared to the rest of the mark; the small "j" in the midst of the numeral does not distract from the "316" nor does it detract from the numeral's overwhelming dominance in the overall commercial impression of the mark.

Likewise, the oval background design in the registered mark is a mere carrier device for the "316."

The numeral "316" likewise is a prominent feature of applicant's mark.⁴ The word TEAM, as it appears in applicant's mark, clearly is subordinate to, and refers directly to, the numeral "316"; the connotation of applicant's mark is that "316" is the name of the "team." The relative suggestiveness and weakness of TEAM, vis-à-vis "316," is further evidenced by the numerous third-party registrations covering clothing items made of record by the Trademark Examining Attorney. These registrations are of similarly-constructed marks wherein the word TEAM precedes and refers to a second, dominant word in the mark, which would be viewed as the name of the "team": TEAM VOODOO; TEAM SANCHO; TEAM YELLOW; TEAM LOSER; TEAM MORON; TEAM METAL; TEAM CF; TEAM FREEDOM; TEAM WICKED, TEAM GLORY; TEAM CONVICT; TEAM 2000; TEAM FLORIDA; and TEAM DAIWA.

Applicant contends that "316" is a "generic" term, the mere presence of which in the two marks is an insufficient basis for finding the marks to be confusingly similar. Specifically, applicant contends that "316" readily would

⁴ Applicant's voluntary disclaimer of "316" has no legal effect on our likelihood of confusion analysis. See *In re MCI Communications Corp.*, 21 USPQ2d 1534, 1538 (Comm'r 1991).

be recognized as a reference to the Bible verse "John 3:16," and that no single entity should be able to appropriate that Bible reference to its exclusive use. However, the evidence of record (i.e., the printouts from a few websites submitted by applicant)⁵ fails to establish either the factual or the legal validity of applicant's contention. There is no basis in the record from which we might conclude that "316," or even "John 3:16," is generic as applied to the clothing items at issue in this case, or for finding that it is anything but arbitrary or fanciful. Nor is there any basis for concluding that registrant's mark should be accorded only a narrow scope of protection.

Even assuming *arguendo* that purchasers are familiar with the existence of the Bible verse "John 3:16" (a proposition which the record does not support), there is no basis in the record for concluding that the numeral "316" per se would be recognized as referring to that Bible verse. More fundamentally, even assuming *arguendo* that purchasers would perceive that applicant's mark and the cited registered mark refer to and connote the Bible verse

⁵ These include a printout showing that someone has a personal webpage/internet user name "J316"; a webpage for "j316apparel.com" (which does not appear to be operative - it says "coming soon"); and another webpage for "pastormark@316.org" (which also says "coming soon").

"John 3:16," applicant admits that such connotation would be the same in both marks.

Thus, we find that when the marks are compared in their entireties as to appearance, sound, connotation and overall commercial impression, applicant's mark is more similar than dissimilar to the cited registered mark. The dominant feature of the registered mark is the numeral "316." Purchasers familiar with the registered mark, upon encountering applicant's mark TEAM 316, are likely to assume that a source, sponsorship or other relationship exists as between the two marks.⁶

In summary, for the reasons discussed above, we find that applicant's mark is sufficiently similar to the cited registered mark that a likelihood of confusion will result

⁶ This conclusion is buttressed by the fact that, in several of the above-referenced third-party "TEAM" registrations made of record by the Trademark Examining Attorney (see *supra* at page 6), the second word of the mark, i.e., the "name" of the team, is or refers to the primary mark or trade name of the registration's owner. For example, Registration No. 2,318,784, of the mark TEAM YELLOW, is owned by Yellow Freight System, Inc.; Registration No. 1,836,859, of the mark TEAM DAIWA, is owned by Daiwa Seiko, Inc.; Registration No. 2,204,934, of the mark TEAM CF, is owned by Cystic Fibrosis Foundation; and Registration No. 2,129,910, of the mark TEAM WICKED, is owned by Pete's Brewing Company (which, on the face of the registration, also has claimed ownership of additional registrations of WICKED marks, e.g., Registration No. 1,646,210, which the Office's records show to be of the mark WICKED ALE). To the extent that the purchasing public is familiar with this practice, they are likely to assume that the owner of the registered "316" (or "John 3:16," per applicant) mark also is the source or sponsor of, or otherwise connected with, goods marketed under the mark TEAM 316 (or "TEAM JOHN 3:16," per applicant).

when the marks are used on the identical goods involved in this case. If we had any doubt as to this conclusion (we do not), such doubt would be resolved against applicant. See *In re Hyper Shoppes (Ohio) Inc.*, 837 F.2d 840, 6 USPQ2d 1025 (Fed. Cir. 1988); *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984).

Decision: The refusal to register is affirmed.